

Reference for a preliminary ruling from High Court of Ireland (Ireland) made on 25 July 2014 –  
Maximillian Schrems v Data Protection Commissioner

(Case C-362/14)

Language of the case: English

Referring court

High Court of Ireland

Parties to the main proceedings

Applicant: Maximillian Schrems

Defendant: Data Protection Commissioner

**Questions referred by the Irish High Court:**

*“Whether in the course of determining a complaint which has been made to an independent office holder who has been vested by statute with the functions of administering and enforcing data protection legislation that personal data is being transferred to another third country (in this case, the United States of America) the laws and practices of which, it is claimed, do not contain adequate protections for the data subject, that office holder is absolutely bound by the Community finding to the contrary contained in Commission Decision of 26 July 2000 (2000/520/EC1 ) having regard to Article 7, Article 8 and Article 47 of the Charter of Fundamental Rights of the European Union (2000/C 364/012 ), the provisions of Article 25(6) of Directive 95/46/EC3 notwithstanding?*

*Or, alternatively, may and/or must the office holder conduct his or her own investigation of the matter in the light of factual developments in the meantime since that Commission Decision was first published?”*

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1 Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441)

OJ L 215, p.7

2 Charter of fundamental rights of the European Union

OJ C 364, p. 1

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

OJ L 281, p. 31

## Initial Pleadings

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Mr Travis (for Max Schrems):

*See original notes, published on [europe-v-facebook.org](http://europe-v-facebook.org).*

- Mr Schrems is an EU facebook users
- Complaint is about transfer from Ireland to the US
- Data transferred to US is subject to “mass & indiscriminate surveillance”
  - = processing incompatible with fundamental right to privacy
- More serious than Data Retention (Digital Rights Ireland Case Law):
  - The same principles apply a fortiori to the far more egregious breach which occurs now (in DRI there were still at last some limitations / judicial oversight + was not about content)
  - US laws lack any similar safeguards + allows access to content of Mr Schrems data.
  - Not just disproportionate, but the essence the right to privacy is infringed
- Re: invalidity of Safe harbor
  - Decision violates both its own legal basis (article 25(2)), but also with higher ranking EU law
  - Measures based Directive must comply with fundamental rights
  - Right to privacy offers protection against both public and private infringements
  - Validity was always contested by Mr Schrems – opposing views are wrong.
  - Says CJEU is entitled to consider validity of Safe Harbor, even though this was not explicitly asked by the referring court (cites Schwarze case)
- There is a duty on national DPAs and EU institutions to protection fundamental right of privacy
  - Commission must interpret competence in article 25 in light of overriding objective of protecting privacy
  - National DPAs are bound to apply national laws, including fundamental rights, and must carry out independent investigation
  - It would be contrary to “independence” if national DPAs were “absolutely bound” to EC adequacy decisions
- Safe Harbor requires violations of US law (via SHPs) (cites article 3-4 decision) , this is wholly unacceptable / prevents national DPAs from effectively fulfilling their duties; benchmark should be EU law
  - So SH is invalid in and of itself
  - However, if the court considers Safe Harbor to be valid in principle, DPAs should be required to verify in in particular instances when presented with reasonable complaint
- An adequacy decision must fulfill both requirements of article 25(2) and (6)
  - Material: Adequate level of protection
  - Formal: Protection must come from national law or *binding* international commitment
    - SHPs / FAQs are a merely self-styled statement by US, not binding international commitment as under Vienna convention
  - Adequate level of protection requires effective remedy
- Commission has itself admitted that Safe harbor is broken / needs to be fixed

- If you were to invalidate, all it would do is place US companies in same position of as all other companies in the world and US companies who have not “self-certified” their compliance with SHPs

#### *Irish Data Protection Commissioner*

- With powers, there come limitations. Limitations are the main theme of their submission.
- This case is about powers of DPAs and the limits of those powers
- DPC’s are first and foremost bound by national laws which establish their office, which requires them follow community finding
- DPC cannot strike down national law / directive / EU act
- DPC is bound by complaint + evidence submitted → Mr. Schrems wanted to discuss safe harbor in a general way, he did not allege that Facebook actually violates Safe Harbor, nor that he was in any specific way harmed
  - Same applies for Irish Court, Max didn’t invoke invalidity of directive / safe harbor there
- Now he’s trying to expand
- Court did not ask validity. Safe Harbor is not on the table. DPC asks court to respect limits of the case.
- The EU has decided to regulate international transfers with US through the EC
- Safe Harbor is a “negotiated compromise” , not complete equivalence.
- But questions of no longer be valid are to be decided, reviewed, negotiated by EC
  - Not up to DPAs
- The DPA or High Court didn’t have any real evidence submitted to it that enforcement mechanism will not work, just newspaper report
- Charter of fundamental rights does not allow national DPAs to disregard national law or other EU laws
- It’s a matter of international diplomacy, better done by Commission than by national DPA

#### *Digital Rights Ireland (Amicus)*

- Safe Harbors is imposed on Member States as an absolute, they cannot call into question
- Article 3(1)(b) of SafeHarbor would not be a solution.
- However, safe harbor was adopted pursuant to directive + is instrument of community legislation (tertiary instrument)
  - ➔ Must be valid / compliant with higher ranking law
  - ➔ Independent supervision of directive requirements + charter is required
- Court has itself invalidated decisions because Commission exceeded its authority
- The power of the DPC , including power to suspend international transfers, is not affected by EC decisions
- Regulation 45/2001
- EDPS may conduct investigations on its own initiative + is not limited to instances where EU is acting as data controller, but also where EU adopts decisions affecting personal data
- Article 25(2): national law and/or international commitment
- However, not national laws on the books are not only factor to consider, Commission must consider adequacy of practices as well
- Commission itself has raised significant concerns with regard to actual protection offered by Safe Harbor.

- Adequate level of protection must include effective judicial protection. However, FAQ11 offers companies choices, none of which are judicial protection
- FTC has never analyzed complaints regarding safe harbor pursuant to EU complaint
- Companies' self-certification is not a finding of adequacy, it's just a decision to stop looking
- Formal requirements of Article 25(6) not fulfilled, only an ad-hoc certification.
- Commission, if necessary, must renegotiate, safe harbor (article 3(4)). The CJEU may also evaluate if the EC doesn't
- DRI acknowledges difficulty of what happens when 1 national DPA were to invalidate. Therefore, the EDPS is responsible for ensuring harmonized approach among national DPAs
- Commission is not itself an independent supervisor of rights, especially for its decision, there must be oversight

### *Ireland*

- Validity not brought up by the Irish court.
- Commission SH decision binds national Member States, s 11 of the DPA Act is consequently an implementation of EU law.
- It is for the COM to make decision on the „adequacy“ under Article 25. DPC must act within the limits of the law.
- SH satisfies requirements of Directive 95/46
- Article 25 scheme is predicated upon the EC making findings of adequacy, no similar power is afforded to DPAs in article 28, and DPAs must act within the limits of their powers
- EPDS does not have any express formal power of review for EC decisions
- EU cannot impose its standards unilaterally on third countries, this is why article 25 does not require an “equivalent” level of protection, but an “adequate” level of protection
- As long as EC doesn't repeal or suspend, national DPAs must recognize – Member States cannot unilaterally undermine

### *Belgium*

- There is no hierarchical order between the chapter on supervision and chapter on transfer
- Chapter of Directive 95/46: Rules on transfers are not overriding the rules on the independent authority.
- In fact, supervisory authorities are endowed with power to supervise compliance with the directive
- Purpose of EC adequacy decision is to provide legal certainty and are binding for Member States and part of the legal framework which DPAs are in principle bound to apply it. However, adequacy decision are of indefinite timespan, and circumstances may change. And Member States are obliged to ensure continuous level of protection → if there are specific circumstances indicating there is no longer adequate level of protection, DPAs are not absolutely bound by adequacy decisions
- Circumstances changed for SafeHarbor. No explicit duty to review SH in the law, but general obligation to do so.
- The types of surveillance raised in this case do go against the essence of the right to privacy, as confirmed by DRI
- If there is a fundamental violation of fundamental rights, the COM decision cannot preclude the DPA to take action.

- But there must be imminent risk + clear harm. Article 3 – Grave harm is satisfied if Article 8 CFR is violated. Article 3 if asked for „secondary harm“ is against Art 8. If this is not established in the case at hand by Snowden revelations, it is hard to imagine what would.
- PRISM is a manifest violation of fundamental rights. If DPAs are deprived of action this is not implemented.
- Recommends answering the question referred in the negative

#### *Austria*

- EC adequacy decisions are not applicable in national laws, Directive says that Member States shall take the measures necessary, not blindly follow it.
- Positive adequacy decision can be transformed in different ways by the MS (copy into national law, or reference in the law..)
- Article 25(6) does not contain express obligation on Commission to evaluate ongoing of adequacy of the level of protection, but there is an implicit one under higher ranking law. If the Commission fails to do so, there is a possibility for individual Member States to investigate and, if necessary, to take additional restrictive measures. There are indications that this is necessary.
- Opposed to Ireland, AT thinks that there has to be way to suspend flows.
- „We expressly contest the view of Ireland“ – Article 3 is an „emergency exit“, any may be used, but Article 3 „emergency exit“ too narrow, given the four requirements in Art 3(1)(b). Article 3 allows basically no independent review.
- Practical effectiveness needs to be at forefront.
- Again: vs. Ireland: This is not about expanding EU laws to the US, but providing basic rights.
- We are not looking at third countries and trying to compel the mto adopt EU law, what we are doing is asking to avoid negative impact on fundamental rights of EU citizens
- The SafeHarbor has a very complicated structure, even for experts. AT refers to Mr Schrems submission (expert paper by Prof. Boehm).
- Effective remedy is a core requirement of Directive (again vs. Ireland), cannot just be lower...
- In framework agreement (third pillar): effective of judicial and administrative remedy
- Safe harbor is not US law nor does it create international commitment, so there is actually no basis whatsoever for the EU's SH decision! SH decision should be repealed
- SafeHarbor is a „negative decision“. „Safe Harbor is just a safe harbor for data pirates“.
- SafeHarbor was never legal. The decision has to be invalidated, maybe with a grace period.

#### *Poland*

- SH is based on the Directive, so should be interpreted in light of the Directive as much as possible. The directive has priority over the SH decision.
- So a commission decision cannot prevent national DPAs from exercising powers with which they are endowed. If there are provision in SH which unduly restrict powers of DPA, priority should be given to Directive's provisions on powers of national supervisory authorities.
- A commission decision is not incontestable. There has to be a security mechanism.
- The list of cases when data flows can be suspended can be defined as in Art 3 of the SafeHarbor, but not in such a way.
- Poland does not a priori exclude the conditions imposed by SH upon national interventions, but the restriction is not absolute and presumption of adequacy must be rebuttable. The SH decision must allow for mechanism to suspend ; national DPAs must have possibility to conduct investigations and if, as a result of such an investigation, finds that a given

organizations does not provide an adequate level of protection, than the national DPA must have the power to suspend vis-à-vis that organization in the event of the absence of a decision to suspend transfers by EC

- The will of the EU legislature in Art 25(2) is an overall adequacy concept. So judicial review in the US is necessary (ref. to Article-29-WP documents).
- Suspension of flows under SafeHarbor must be possible, when fundamental rights are infringed.

*(First break)*

#### *Slovenia*

- SH decision requires MS to not interfere with its operation. But this does not prevent national DPAs from carrying out their independent investigations.
- The SH decision is an implementing act, having directive 95/46 as its basis. The powers bestowed on DPAs through Directive thus trump any provisions of SH decisions in case of incompatibility
- Art 25 „adequacy“ is not just laws, but overall assessment. Judicial review on EU standards are relevant.
- The Commission is not limited to assessment of statutes, but must also assess practical implementation.
- EU citizens must have effective access to remedy, in accordance with EU standards
- SafeHarbor was initially compliant in 2000, because MS have not sued the COM over it [sic].
- At the time of adoption, SH decision was in line with requirements of the Directive. But findings in latest EC communications do point to violations of human rights in transfer to US. The burden of proof incumbent upon individuals should not be so high. Substantial likelihood of breach is sufficient.
- On Art 3 in SH: No overly great burden on citizens to prove surveillance.
- National supervisory authorities can act, regardless of whether EC acts or not.
- Regulation 45/2001 is not suitable basis upon which EDPS could act independently

#### *United Kingdom*

- Member States must take all measures necessary to give effect to an EC assessment adequacy. This is natural reading of article 25(6)
- DPAs are fully bound with adequacy decisions.
- Directive as whole aims to protect rights, but also to support free flow of data.
- Article 25 empowers commission to adopt decisions to avoid different approaches / findings across member states
- Cross border data flows are necessary for expansion of international trade
- The commission's ability to negotiate effectively is predicated upon EC position to have the power to reach a common and binding assessment of adequacy. The duty of each member state is therefore to give effect.
- Can EC prevent national DPAs from exercising their own powers? DPAs must comply with adequacy decisions adopted by EC. It cannot prohibit transfer on the basis of inadequacy of laws/commitments. However, this does not prevent DPAs from verifying whether a specific individual transfer fails to offer adequate level of protection, even if it is generally covered by an adequacy decision. DPAs can use their powers to investigate all their powers to investigate specific instances of breach. DPAs thus preserve ability to investigate, and if

necessary to suspend, international transfers specific international transfers. These then are in the end questions of lawfulness in a specific instance, not of general assessments of adequacy

- Binding nature of SafeHarbor does not mean DPA cannot suspension under Article 3(1)(b) – see Article 2 of SH as well. Authorities may also assess adequacy having regard to factors than other domestic law or international commitments. In other words, adequacy decision does not offer carte blanche
- DPAs preserve their power to assess compatibility with fundamental rights in individual instances
- Can EC subject DPA's exercise powers to conditions? Nothing prevents an enabling provision (e.g. to confirm in an individual case)
- With regard to EDPS' power: no, there is no role for EDPS here, their power is only for processing by institutions (not private data controllers)
- Must there be effective legal remedy under for EU individuals in the laws of the third country? Yes. But should also be available within the EU, as the origin of the complaint is the transfer from the EU
- SH decision did comply with fundamental rights at the moment of adoption. The EC recent communications don't really change anything, they are just policy documents + there is no affirmative obligation on EC to suspend SH in light of these findings, especially as the position of the EC is that improvements can be made
- UK is of opinion that CJEU has no basis to strike down SH decision + that doing so would undermine legal certainty.
- EDPS has no authority to invalidate SH
- Fragmentation is a problem if SH is invalidated.

#### *European Parliament*

- 1) About the effects of an EC adequacy decision
  - The effects of an adequacy are limited, as defined by EU legislature + subject to the Charter
  - Article 25(1) sets up a binary situation: either there is an adequate level of protection, or there is not ("like a light switch"). The default position is that it is not.
  - An EC adequacy decision offers only a *presumption* of adequacy. Such a presumption can be rebutted if there is an indication of systemic inadequacy
- 2) EC cannot limit DPA powers under article 28 by means of an adequacy decision, it is the EU legislature who has defined the powers of DPAs
- 3) Role of EDPS: EDPS can monitor, issue guidance and co-ordinate, even if the EU isn't acting as controller.
- 4) Effective judicial protection is essential requirement of "adequacy"
- 5) Validity of SH
  - EP has expressed doubts about SH decision as early as 2000 → EC just ignored
  - Now there was another resolution after Snowden
  - EC has found itself that there is mass surveillance.
  - At present, US does not offer adequate level of protection, „Systematic inefficiencies“ this „cannot be avoided“. → EC cannot / should not maintain SH decision on the basis of the evidence which it already has
  - EC has no power to maintain SafeHarbor given the facts. It has a duty to suspend it. EP has made a resolution, not action.
  - „Limitation“ of Safe Harbor not an option

- Everyone is bound to act under primary and secondary law. 1. Limited legal effects – rebuttable presumption. 2. When adopting a decision must take into account judicial protection in the US. 3. It is impossible to conclude an „adequate protection“.
- 6) Power of DPAs to investigate
  - If there is clear indication of systemic violation, ALL EU institutions and national DPAs are bound to act

### *EU Commission*

- If the EC adopts an adequacy decision, Member States may not prohibit transfers based on their own finding of inadequacy. Adequacy Decisions must be applied by DPAs. In principle not empowered to suspend, however not prevented from taking actions.
- The EC assessment replaces the individual assessment by individual Member States and must be applied by national DPAs. So in principle DPAs cannot stop transfer.
- However, the SH decision does not stop DPAs from investigating adequacy in a particular instance (only prevented from doing so on a general level). There must be a certain indication of gravity before suspension.
- Safe Harbor allows „back door“ in Article 3, but limitations of Art 3 necessary.
- Suspension of data flows under Art 3 SH only when there is a certain threshold of privacy violations *[Note: The EC contested that this is the case here.]*
- The EDPS is not responsible for monitoring compliance with Directive 95/46, only with Regulation 45/2001. As result, EDPS cannot review/invalidate EU decisions adopted pursuant to Directive 95/46. As long as there is no EU institution processing personal data, they are not competent.
- The concept of adequacy allows for different types of enforcement mechanisms. The US offers a combination of various redress mechanisms (FTC, self-regulatory ...), including judicial. Together, these measures offer an “adequate” level of protection, at least from a procedural perspective. *[Note: None of them hold a remedy in the PRISM case]*
- Recent EC findings suggest there is excessive reliance on national security exemptions by the US.

Q by Court:            You’re not gonna talk about the validity back in 2000?

A: EC submits that Safe Harbor was valid then.

- Safe Harbor is subject to 13 points plan
- The EC therefore can NOT confirm that the SH regime still offers an “adequate level of protection”.
- However, the EC shouldn’t be criticized for not dismantling SH immediately, as they are currently in the process of renegotiating it and to pull the plug would be too disruptive for these negotiations. EC has to look at all interest: External relations, business, fundamental rights.. EC needs discretion for the kind of measure and timing. The CJEU should not prejudice the talks with the US.

### *EDPS*

- Data protection authorities have consistently criticized the shortcoming of the SH decision, especially in relation to national security, but the overall criticism is independent from this.
- Mass surveillance inconceivable in 2000 but now there is 9/11 and Snowden. In a recent opinion, we confirmed that SH was simply not designed to deal with mass & indiscriminate



surveillance. Current mass-surveillance by US could be argued to violate the essence of the right to privacy because, contrary to DRI, they do gain access to content.

- Article 7 & 8: The essence is violated, if one looks at data retention case law. See also difference between content and meta data – under Data Retention Ruling. Absence of Article 8(2) and (3) protections in Safe Harbor.
- Safe Harbor cannot overrun the independence by DPAs. Art 3(1)(b) allows suspension, and is not a limitation.
- The EDPS is in the same position as national DPAs, they must be completely independent. The EC cannot affect the powers of DPAs or otherwise infringe their independence, they must have the ability to undertake their own assessment
- As to the future, the commitments made by the US in the coming months must be sufficient, otherwise EC should suspend SH. But in the meantime, national DPAs retain all their powers to investigate under Article 3.
- Transatlantic dialog is important, but in this case there is a failure of the essence of the right to privacy.

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### **Questions & answers**

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(first set of question asked by Judge Rapporteur, exclusively at EC)

- 1) Are the powers of national DPAs / EDPS limited by article 3,1 b of SH decision

A: DPAs have all powers granted by article 28 of Dir 95/46, but as long as SH hasn't been repealed they shouldn't undermine it

- 2) VERY explicit questions for the COM. Recital 5 of the Safe Harbor Decision- „should“ be attained. „are considered to ensure“ – What is this? DO the Safe Harbor Principles, or SHOULD they ensure protection?

A: it is a real finding / decision not just a general statement of presumption

- 3) Doesn't article 25(1) require that it “ensures” an adequate level of protection?

A: Overall view is necessary.

- 4) And does “ensure” not mean the same as “guarantee”?

(no real answer)

- 5) Re: Annex 1, § 4 + Annex 4(B) of SH (national security exemption). Question: Let alone the exception “necessary for national security purposes” – what about the exception for “necessary to comply with any US law”. Are exceptions established entirely by US law, how can we argue that there will be adequacy from the perspective of EU law?

A: This provision requires application of proportionality

- 6) Isn't US law always overriding the Safe Harbor? How can you then plead that this ensures protection?

COM: Article 3(1)(b) of the Safe Harbor are the „safety valve“

Court: But how does this work with the limitations in Art 3?

- 7) RE: Article 3(1)1b of SH decision and its relationship to article 25(6). Article 3(1)1 is not about “adequacy” as such, rather it is a statement about the power of DPAs → wasn’t the EC exceeding its authority here? Does this go together with the “independence” of DPAs? Where do you take the power to limit the DPAs in Art 3 SH?

(no real answer, just saying that Commission has power to do general adequacy findings, does not limit powers in specific cases)

- 8) Was there no duty to suspend?

A: EC should assess all interests involved

- 9) Directive requires COM to PROHIBIT transfers (Recital 57). Do you still have this discretion?

A: Legal certainty and EU-US data flows, diplomacy are factors to take into account to not suspend data flows..

- 10) Are you pleading that SH decision is not subject to the requirements of article 8(3) of the European Charter (requirement of independent supervisory authority)?

A: yes. It is not the task of national DPA’s to call into question the EC’s general finding of adequacy

Add-on question: Are you saying Safe Harbor is not subject to Article 8(3) CFR? well what about EC vs. Hungary re: independence of DPAs?

A: no real answer

*(Break –resume at 3PM)*

Questions by AG for EC:

- 1) question of vocabulary: the meaning of the verb “to ensure”

When you talk about expressing an obligation, as in the Directive, it can be seen as an obligation to ensure that adequate protection actually exists

A: when I read article 25 as a whole, I see that it is up to the member states to check for adequacy, which is an assessment of a situation, not necessarily requires presence of international obligation/commitment. There is no direct obligation incumbent on states of third countries. When the EC does an adequacy finding, it has assessed the solidity of the system of the protection in the third country. In case of SH, the US gvt communicated to the EC, by administrative letter, the SHPs and its willingness to enforce / they informed us they would / made a commitment

- 2) article 8(1) of the charter

You said there is an area of exclusive competence of the decision, which may not be evaluated by national DPAs. But article 8 provides everyone right to effective protection. How can this be provided, if there is “exclusive competence” for the EC?

A: EC cannot say article 8 applies to other country, we can only talk about their duty to protect EU data subjects if they are aware of infringements. If not, the EC has to take actions. But the decision of adequacy does not become illegal from one day to another, simply because we

become aware of some developments. We have taken action in light of developments (renegotiations), which are appropriate in the circumstances

Follow-up Q: but how does this relate to individual case? If I were on Facebook, what recourse do I have?

A: the Commission has acted immediately upon the revelations, has found there were shortcomings and then engaged in renegotiations. It might perhaps not be as promising from the perspective of the individual user that there will be talks with the US about additional safeguards, but it is from the perspective of the EU and we will obtain appropriate assurances from the US

But what happens until then?

Q: your goal is not to revoke SH, even in light of findings, your goal is instead to leave it in place and then ask for additional guarantees / commitments?

Q: what is your timeline for assurances / commitments? If I understand correctly, your recommendations already date from 2013?

A: we have sufficient indications that there is hope that our recommendations will be addressed.

Q: but what can I do as an individual in the meantime?

A: you could close your Facebook account, revoke your consent

Q: but if I wish to approach a national authority, can I?

A: yes, but in line with article 3(1)1b

Question for DPC (from Austrian judge):

Ireland stresses limitations of its own authority? This is unusual for an authority. Is this caused by fact that you are so understaffed? How many lawyers do you have? Is this caused by the fact that Ireland wishes to be attractive for US tech companies?

A: Not sure about the number of lawyers. More resources given to the DPC.  
One still needs evidence.

Q: Can maybe Ireland answer the question on the number of lawyers?

A: we have increased resources + Ireland applies data protection law same as other member states

Question by Lenaerts for EC:

The legality of an act is to be assessed by the applicable law at the time of its enactment. However here, we are confronted with a decision which assess adequacy – which is an evaluation of a factual context in a third country in a particular point in time. Should we, 15 years later, be bound by historical facts? Isn't adequacy something evolving? Isn't there a continuous obligation to assess by the Commission? There is no time reference for reference

of preliminary ruling. So how can we deal with this? Will we always be bound by 15 year old decisions, even in light of interim developments? When is the CJEU able to assess?

A: implicitly acknowledges

Question for Schrems: can you define the actual harm inflicted on client?

A: breach of essence of right to privacy, by virtue of mass & discriminate surveillance

Q: but do you have specific evidence of his case?

A: no, but this is not a requirement – a breach of right to privacy is sufficient harm, there is no need for demonstration of secondary harm

Q: is right to privacy absolute?

A: there might be overriding interests – but US does blanket collection, without claiming any specific need

Question for EC: assuming that indiscriminate surveillance of content took place, can there be overriding interests, which can still justify it?

A: the national security issues of a third country are not as such national security issue of EU, but if there is no safeguarding framework whatsoever, there is no adequacy

And what is the answer then?

A: action is to obtain additional guarantees

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### **Closing Statements by Schrems, DPC, Ireland, Commission**

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#### *Schrems*

Essential elements:

- 1) the US gvt has authorized itself mass & indiscriminate surveillance
- 2) the EC has confessed today that it itself cannot protect privacy of EU citizens once it has b
- 3) EC SH decision violates its own legal basis
- 4) It is undisputed that the US does not have sufficient domestic laws to protect
- 5) Any type of public law of the US can override rights of individuals → there is no adequacy
- 6) Mass & indiscriminate surveillance violates essence of article 8 Charter.
- 7) It is remarkable that EC argues that it is not bound by article 8 when making decision

CJEU should undertake full judicial review

Article 3 (1)1b should be considered ultra vires, if not, it should at least be interpreted in compliance with EU law

Both options result in national DPAs having power to set aside SH decision

The result of doing so is not to distort the internet / trade, it simply goes back to normal situation which all other business in the world face (only about 1000 companies have self-certified for safe harbor, the rest opts for normal approach)

States have positive to protect, so obliged to investigate reasoned complaints

#### *DPC*

Mr. Schrems has not been harmed in any way, the NSA is not interested in essays by law students

National DPAs shouldn't be allowed to gradually dismantle safe harbor.

#### *Digital Rights Ireland*

Article 3 is important, but the "Safe Harbor" is overall not adequate. If Article 3 is fixed, it would still refer to "principles" that do not guarantee adequate protection.

#### *Ireland*

If SH is inadequate, even if its adhered to, then article 3(1)b can in no way limit the rights of EU citizens. Ireland welcomes clarify from CJEU on this issue

#### *European Commission*

On the distribution of powers: if the EC has the power to adequacy, it must also have power to find adequacy on certain conditions → EC must be able establish adequacy in principle, which may not be the case in a particular instance. Irish DPA has no power to review adequacy decision as such.

A harmonized approach is necessary to ensure proper functioning of internal market → should remain hands of the EC

Advocate general will deliver opinion on 24th of June 2015.